Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

Jeffry A. Brueggeman
Gary L. Phillips
Paul K. Mancini

SBC COMMUNICATIONS INC.
1401 Eye Street, NW, Suite 400
Washington, D.C. 20005
(202) 326-8911 – Phone
(202) 408-8745 – Facsimile

August 6, 2002

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities	)	GN Docket No. 00-185
	)	
Internet Over Cable Declaratory Ruling	)	
	)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities	)	CS Docket No. 02-52

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (SBC) hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.[1] The purpose of this proceeding, as well as the Commission's related wireline broadband proceedings, is to determine the appropriate regulatory framework that should govern broadband services on a prospective basis. SBC's position in all of these proceedings is consistent and quite unremarkable — the Commission must take a coordinated approach to broadband regulation and establish a uniform national regulatory policy for functionally equivalent and competing cable and wireline broadband Internet access services. Moreover, in view of the Commission's decision in the *Cable Declaratory Ruling* to free the dominant cable incumbents from Title II regulation, Title I provides the appropriate framework for regulating *all* broadband information services free of the baggage of legacy regulation.

---

[1] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (*Cable Broadband Declaratory Ruling* or *Cable Broadband NPRM*).

I. INTRODUCTION AND SUMMARY

The comments filed in this proceeding confirm the urgent need for the Commission to implement a consistent approach to broadband regulation. Cable operators uniformly acknowledge that cable and wireline broadband Internet access services are direct competitors in an intensely competitive market.[2] These broadband Internet access services constitute a *new* market that requires an enormous amount of *new* investment on the part of both cable operators and wireline companies. Thus, instead of reflexively applying legacy regulations that were designed for a completely different set of circumstances, the Commission should establish a new regulatory paradigm for broadband services that is best suited to the broadband market and that will further the statutory and policy imperative of promoting broadband deployment.

The Commission's primary focus in this proceeding is whether to impose a mandatory ISP access requirement on cable broadband Internet access services. In making that determination, the Commission must recognize that regulation creates the same costs and disincentives for wireline companies as it does for cable operators. As SBC discussed in its initial comments, cable and wireline broadband Internet access services are both provided using "shared" packet-based network architectures that are functionally equivalent for purposes of providing ISP access. All of the costs, inefficiencies, network management problems and barriers to innovation that cable operators claim would result from a mandatory access requirement apply with equal force to broadband Internet access services provided by wireline companies.[3] Moreover, a mandatory access requirement has the same negative impact on costs,

[2] The National Cable & Telecommunications Association (NCTA) Comments at 30-31; Cox Comments at 18; Comcast Comments at 8-13.

[3] *See* Cox Comments at 19-22; NCTA Comments at 19-24; AT&T Comments at 13.

consumer demand and investment in broadband Internet access services, regardless of whether the service provider is a cable operator or a wireline company.[4] Cable's forceful advocacy about these costs and disincentives simply proves SBC's point that asymmetric regulation of wireline broadband Internet access services *does* matter and has concrete effects on the ability of wireline companies to compete against deregulated cable operators in the broadband market.

SBC and other wireline companies are not seeking regulatory parity for parity's sake, as some cable operators claim.[5] Rather, establishment of a uniform regulatory framework for cable and wireline broadband Internet access services is a fundamental precondition for sustainable competition. There can be no serious question that the current system of asymmetric regulation skews competition and deters investment in the intensely competitive broadband market. As NCTA acknowledges, imposing regulation uniquely on wireline broadband Internet access services makes wireline companies "*a less effective competitor to cable*" and denies wireline broadband customers the benefits of lower prices and higher quality services.[6]

It is no answer to argue, as NCTA's economist does, that it is better to uniquely burden wireline companies than it is to extend regulation to cable broadband Internet access services.[7] The Commission must recognize that maintaining the current asymmetric regulatory regime is extremely harmful to consumers and the public interest. It contravenes the goals of section 706 by undermining the incentive of wireline companies to spend hundreds of billions of dollars upgrading their networks to match the existing capability of cable broadband networks. And it

---

[4] *See* Cox Comments at 19; NCTA Comments at 24-26.

[5] AT&T Comments at 23; NCTA Comments at 33.

[6] NCTA Comments at 42 (emphasis added).

[7] Bruce M. Owen, *Forced Access to Broadband Cable*, submitted on behalf of NCTA, at 21 (June 27, 2002) (*Owen Economic Paper*).

distorts competition by making it extremely difficult, if not impossible, for wireline companies to continue to compete with cable operators in the provision of broadband Internet access services. The ultimate effect of the current regulatory imbalance is to deny consumers the many benefits that will flow from unfettered investment and competition among *all* broadband providers.

Rather than discuss these real-world impacts of asymmetric broadband regulation, cable operators resort to obfuscation. Contrary to their misleading claims, however, there are no technical or legal differences between cable and wireline broadband Internet access services that could possibly justify cable's preferred regulatory status in the broadband market with respect to mandatory ISP access. Nor does the historical regulatory classification of cable operators and wireline companies justify a lopsided ISP access regime in which the nondominant providers alone are subject to regulation. The simple fact is that, in the broadband Internet access arena, cable operators and incumbent LECs provide the same service. They should be subject to the same rules.

The Commission accordingly must harmonize its regulation of broadband services by establishing a uniform national framework for broadband Internet access services, as well as other broadband information services. And because the Commission has already excluded cable broadband from regulation under Title II, it follows that this uniform national framework must be constructed under Title I. If the Commission believes some type of mandatory ISP access requirement is necessary, then it has authority under Title I to impose such a requirement on cable and wireline broadband Internet access services.

II. THE COMMISSION MUST HARMONIZE ISP ACCESS REQUIREMENTS FOR CABLE AND WIRELINE BROADBAND SERVICES.

The Commission must determine in this proceeding whether the costs of imposing a mandatory ISP access requirement on cable broadband Internet access services outweigh any benefits of such a requirement. As SBC explained in its initial comments, the exact same question is at issue in the *Wireline Broadband* proceeding. The Commission accordingly must conduct a comparable cost/benefit analysis for cable and wireline broadband Internet access services under section 706 and determine the appropriate regulatory framework for *all* broadband Internet access services. The Commission cannot rationally conclude that broadband Internet access service provided by cable operators should be deregulated without reaching the same conclusion for similar services provided by wireline companies.

A. Cable and Wireline Broadband Networks are Functionally Equivalent for Purposes of Providing ISP Access.

In its initial comments, SBC explained that the network architectures of cable broadband networks and wireline broadband networks are functionally equivalent for purposes of providing access to multiple ISPs. Specifically, a similar packet-based network is used to route traffic between the cable head end and each ISP as is used to route traffic between the wireline central office and each ISP. NCTA's comments concede as much. It notes that multiple ISP access can be accomplished at the head end by permitting ISPs to connect to the cable operator's Cable Modem Termination System (CMTS).[8] NCTA also states that there may be other possible points of ISP interconnection, such as regional data centers or even the national Internet backbone.[9] However, under any of these scenarios, the head end — and not the customer premises — is the first point in the network where ISP access requirements come into play.

[8] NCTA Comments at 21.

[9] *Id.*

Simply stated, ISP access occurs at the head end and central office, or points beyond, for both cable and wireline broadband networks, respectively. Both networks are packet based. There are no relevant differences in technology or network architecture that affect how multiple ISPs gain access to cable and wireline broadband networks. In short, there is nothing unique about cable broadband networks that would provide a factual basis for imposing different ISP access requirements on cable and wireline broadband networks if the Commission determines that government intervention is necessary.

The nature of the facilities between the customer premises and the cable head end or wireline central office is irrelevant to the issue of ISP access. Some cable operators continue to claim that cable and wireline broadband networks are different because cable's "last mile" architecture is "shared," while wireline's is not.[10] AT&T, for example, asserts that DSL services "are not materially different from older 'pair gain' technologies" because they are provided over the same wires as traditional voice services.[11] This argument ignores the fact that wherever a wireline carrier has deployed fiber in the loop it also has a "shared" last mile architecture. A prime example is SBC's last mile Project Pronto broadband investment, where a shared fiber-based packet architecture is deployed between a remote terminal and equipment located in the central office. AT&T also ignores the fact that the wireline network is evolving from DSL, which is merely a transitional technology, to end-to-end fiber facilities. More importantly, though, regardless of the shared or dedicated nature of the last mile facilities, all Internet traffic carried on both cable and wireline broadband networks is carried over a shared packet-based

[10] Cox Comments at 23-24; NCTA Comments at 22.

[11] AT&T Comments at 25; *see also* Cox Comments at 23.

network that connects the cable head end or central office to each ISP. Thus, arguments regarding purported differences in last mile facilities are a red herring.

Cable operators also attempt to make an issue of their last mile architecture by claiming that an ISP may provide an end user with a bandwidth-hungry application (such as streaming video) that could impact the bandwidth capacity available to other end users.[12] This issue is not unique to cable broadband services. Wireline companies must manage the limited bandwidth capacity of their shared broadband networks in the same manner as cable operators. Moreover, the potential for bandwidth limitation problems exists even in the absence of multiple ISP access. A cable operator's own end users are equally capable as another ISP's end user customers of using their cable modem service for bandwidth-hungry services and applications.[13] The issue is simply one of managing resources, as the cable operators must do every day as they increase their customer base. Indeed, cable operators *already* are taking steps to prevent bandwidth problems by implementing tiered cable modem services that assess additional charges on end users with very high usage levels.[14] Once again, potential bandwidth limitation problems are equally applicable and equally solvable for cable and wireline broadband networks.

[12] Cox Comments at 24; NCTA Comments at 24.

[13] Cox Comments at 26 (noting that Cox Communications is "in the process of launching new bandwidth-hungry services such as video-on-demand").

[14] *See id.* at 18; *see also* Press Release, *AT&T Broadband Offers New Faster Speed to Cable Internet Users* (Aug 1, 2002) (announcing a new higher-priced "UltraLink Service" that provides 3 mbps of downstream capacity and plans to test a lower-speed tier of service later this year). Available at: http://www.attbroadband.com/services/news/pressreleases/PressReleaseDetail.jhtml?page=/services/news/pressreleases/2002_08_01.html.

B. The Same Cost/Benefit Analysis Must be Conducted for Cable and Wireline Broadband Services.

Comments filed by cable operators in this proceeding go to great lengths to demonstrate that a mandatory ISP access requirement is costly and inefficient and that such a requirement creates negative incentives for broadband investment and innovation. In many respects, these comments mirror the comments that SBC has filed in the Commission's pending broadband-related proceedings. The only difference is that SBC has experienced firsthand the costs and negative market impacts of a mandatory access requirement on its broadband Internet access services, whereas cable is merely speculating about them. Ultimately, whatever determination the Commission makes about whether the costs of imposing a mandatory ISP access requirement on cable broadband Internet access services outweigh any purported benefits applies equally to wireline broadband Internet access services.

Given the similar network architectures of cable and wireline broadband Internet access services, it is not surprising that cable commenters identify the same costs and network management issues created by a mandatory ISP access requirement as wireline companies have identified. Both cable and wireline broadband providers must incur costs associated with establishing a physical point of connection with each ISP and providing a means of routing traffic from end-user customers to each interconnected ISP.[15] Moreover, both cable and wireline broadband providers must incur the costs of managing bandwidth resources on their shared network architectures and may be required to incur the costs of deploying additional equipment,

[15] *See* NCTA Comments at 20-21. If anything, the cost of providing ISP access should be cheaper for cable operators because they can aggregate an ISP's traffic on a nationwide basis, whereas many ILECs are still prohibited from carrying ISP traffic across LATA boundaries in many areas of the country.

such as packet routers, in order to accommodate additional traffic generated by ISPs.[16] In addition to increasing a broadband provider's costs, a mandatory access requirement also limits the provider's ability to deploy the most efficient network and makes it more difficult to forecast demand on the network.[17]

The fact that wireline companies alone are currently required to incur the additional costs of providing mandatory ISP access is irrelevant. Cable operators correctly acknowledge that the costs and uncertainty of complying with a mandatory ISP access requirement are ongoing, and not just a one-time implementation issue. NCTA, for example, explains that cable broadband networks must be continuously upgraded for new technology and that the growing use of broadband service caused by a mandatory ISP access requirement will require "continuous investment" in additional broadband equipment.[18] Cable operators argue that mandatory access would "destroy[] investment expectations" and have adverse effects on broadband investment and deployment.[19] Indeed, Comcast's President recently stated that "'even a hint'" of regulation "could prove disastrous" to broadband deployment.[20] Cable operators also argue that a

[16] *Id.* at 22-24.

[17] *Id.* at 23-24. As noted above, cable and wireline broadband providers must address network management issues with or without mandatory ISP access. SBC agrees that a mandatory access requirement complicates network planning and management issue.

[18] *Id.* at 25.

[19] Cox Comments at 19; *see also* NCTA Comments at 25 ("[R]egulation that diminishes and discourages investment will stunt the development of cable modem service and the evolution of high-speed Internet services.").

[20] *Comcast President: Cable TV Industry Would Wither if New Rules Enacted*, TR Daily (June 10, 2002) (quoting Comcast president Brian L. Roberts).

mandatory ISP access requirement would make it more difficult for broadband providers to deploy "demand-enhancing" features and content over their broadband connections.[21]

SBC agrees. A mandatory ISP access requirement imposes ongoing costs that affect broadband deployment and the introduction of new features and services. The fact that a mandatory ISP access structure was established for wireline companies in a "one wire" world cannot be the predicate for a forward-looking analysis of the broadband market, where there are competing broadband platforms providing functionally equivalent services. The basis for the Commission's determination must be whether — as a policy matter — cable and wireline broadband Internet access service providers should be forced to incur the ongoing costs of a mandatory ISP access requirement on a prospective basis.

Not only does a mandatory ISP access requirement create the same costs for cable and wireline broadband Internet access services, but any considerations about the need for such a requirement also are exactly the same for both services. Indeed, cable operators expressly rely on the presence of competition from wireline companies to support their argument that regulation of cable broadband Internet access services is unnecessary.[22] It is utterly disingenuous for them also to argue that the Commission can disregard considerations of regulatory symmetry in deciding whether to impose a mandatory ISP access requirement on cable broadband Internet access services.[23] AT&T's hypocrisy goes even further. In the Commission's *Wireline Broadband* proceeding, AT&T has argued that the Commission must impose a mandatory ISP access requirement on wireline broadband Internet access services precisely *because* most ISPs

[21] NCTA Comments at 25-26; Cox Comments at 26.

[22] NCTA Comments at 30-31; Cox Comments at 18; Comcast Comments at 13.

[23] AT&T Comments at 23; NCTA Comments at 33-35; Cox Comments at 12-13; Comcast Comments at 25.

have no realistic opportunity to gain access to cable broadband services.[24] Thus, AT&T would have its own deregulation be the basis for regulating its competitors.

The Commission must disregard such schizophrenic, patently self-serving advocacy. Cable and wireline broadband Internet access services are direct competitors in a discrete and intensely competitive market. Either a mandatory ISP access requirement is necessary for both services in the market or unnecessary for both of them. Indeed, the Commission would have a stronger basis for concluding that a mandatory ISP access is justified for cable operators because of their dominant position in the broadband market. There is no conceivable justification, however, for maintaining an ISP access requirement that applies only to wireline companies, the secondary providers in the market.

Nor is there any basis for concluding that cable operators somehow have a greater market incentive for doing business with unaffiliated ISPs than do wireline companies, as AT&T claims.[25] Both SBC and Verizon have entered into a Memorandum of Understanding (MOU) with the US Internet Industry Association (USIIA) that commits them to continue negotiating commercial arrangements with ISPs for broadband Internet access in a deregulated environment. We are not aware of any comparable commitment on the part of the cable industry. Indeed, as Earthlink points out, the vast majority of cable's access agreements with unaffiliated ISPs are the result of Commission-imposed requirements.[26] For all these reasons, the Commission cannot

[24] *See* AT&T Comments at 3, CC Docket No. 02-33 (FCC filed May 3, 2002).

[25] AT&T Comments at 24.

[26] Earthlink Comments at 8. While Earthlink and other pro-regulation ISPs have attempted to downplay the significance of the MOU by questioning whether it is legally binding, these arguments miss the point. The MOU demonstrates that SBC stands ready to negotiate access arrangements with multiple ISPs. We made a public commitment to do so. So far as we know, AT&T and other cable operators have made no similar offer.

rationally conclude that the costs of imposing a mandatory ISP access requirement on cable broadband Internet access services outweigh the benefits of such a requirement without reaching the same conclusion with respect to similar service provided by wireline companies.

C. An Asymmetric Mandatory ISP Access Requirement Would Have a Disastrous Effect on Competition and Investment in the Broadband Market.

Although cable operators rail about the dire consequences for investment and innovation if cable broadband Internet access services are subject to any type of regulation, they casually dismiss the concerns of wireline companies about the regulations that uniquely burden their broadband Internet access services as "simplistic" demands for "regulatory parity."[27] These positions cannot be squared.

The Commission has correctly ignored the self-interested arguments of cable operators and sought comment on the relationship of this proceeding and the pending proceedings to consider the appropriate regulatory framework for wireline broadband Internet access services. As SBC previously explained, the Commission must take coordinated action in all of its pending broadband-related dockets to establish a uniform regulatory framework for broadband Internet access services, regardless of technology or the historical classification of the service provider. This is not a matter of regulatory parity for parity's sake, but rather a fundamental issue of competition. As the Commission has recognized, its role "is not to pick winners or losers, or select the 'best' technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."[28] Therefore, "all

[27] AT&T Comments at 23; *see also* NCTA Comments at 33; Comcast Comments at 25-26.

[28] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147 *et al.,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶¶ 2, 3 & n.6 (1998).

telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise."[29]

It is imperative that the Commission act quickly to correct the existing, unbalanced state of affairs. Cable broadband Internet access is already by far the "most widely subscribed to technology," with approximately 68 percent of the residential market subscribing to cable modem service.[30] And cable broadband networks are much more robust than existing wireline broadband networks. Cable operators can provide voice, video and data over a single "big pipe," while SBC and other wireline companies are deploying DSL, which is a transitional technology with limited reach and limited bandwidth capabilities. If wireline companies are to emerge as a meaningful competitive counterbalance to the dominant cable incumbents, they will have to spend *hundreds of billions* of dollars upgrading their networks with fiber-to-the-home. That investment — already extraordinarily risky in light of the facilities-based competition in the market — will be impossible to justify if the Commission continues to give the cable incumbents an artificial regulatory advantage in the marketplace by imposing onerous, one-sided regulatory costs on wireline providers alone.

The only way for the Commission to ensure that the broadband market remains competitive is to apply consistent regulations and policies to cable and wireline broadband Internet access services. Indeed, as noted at the outset, NCTA concedes that imposing regulation

---

[29] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 et al.*, CC Docket Nos. 96-98, 95-185 First Report and Order, 11 FCC Rcd 15499, ¶ 993 (1996) (*Local Competition Order)*.

[30] *Cable Broadband Declaratory Ruling*, at ¶ 9. The Commission's latest report on broadband service subscribership confirms cable's dominance and increasing lead in the market. Cable operators added more than 1.8 million broadband customers during the latter half of 2001, compared to only 1.25 million new ADSL customers during that same time period. *High-Speed*

uniquely on wireline broadband services gives cable operators a competitive advantage in the market.[31] In a paper that was submitted with NCTA's comments, economist Bruce R. Owen further acknowledges that "DSL competition would be even more 'effective' — DSL would have a higher market share, and both prices might be lower or service improved — if DSL regulation were removed."[32] Therefore, he concludes that DSL regulation leads to a "second best" outcome.[33] Nevertheless, Owen argues on behalf of the cable industry that it is better to uniquely burden wireline companies than it is to extend regulation to cable broadband Internet access services.[34]

This economic analysis conveniently ignores the competitive harms created by the current asymmetric regulatory regime. SBC agrees that regulation of cable and wireline broadband Internet access is unnecessary and harmful to the public interest. But it also makes no economic sense to saddle secondary market participants with regulatory burdens that increase their infrastructure and operational costs, while the market leader remains unconstrained. Such a policy hampers the ability of wireline companies to gain ground on the market leader, and it chills their incentives to invest in new technologies, including the packet technology that is fueling broadband. The Commission must eliminate these competitive distortions on a going-

---

Services for Internet Access: Status as of December 31, 2001, prepared by the Industry Analysis and Technology Division of the FCC's Wireline Competition Bureau, at Table 1 (July 2002).

[31] NCTA Comments at 42.

[32] *Owen Economic Paper* at 21.

[33] *Id.* Owen also observes that, in a market where there are two or more suppliers of competing services, "whatever their technologies or regulatory categories, there can be little or no justification for regulation of either." *Id.*

[34] *Id.*

forward basis by providing a consistent regulatory framework for competing cable and wireline broadband Internet access services.

D. The Commission Cannot Regulate Broadband Services Based on the Provider's Historical Classification.

Predictably, cable operators do not discuss the market implications of their position that asymmetric regulation of cable and wireline broadband Internet access services is acceptable, if not required. Instead, they attempt to obfuscate the issue by arguing that asymmetric regulation of cable and wireline broadband Internet access services may be justified because of the historical classification of wireline companies (more specifically, ILECs). These claims are baseless and are merely an attempt to distract the Commission from the central investment and competitive issues that must drive the Commission's broadband policies.

SBC believes the Commission's decision in the *Cable Declaratory Ruling* to "de-link" the regulation of cable broadband Internet services from the legacy regulations that apply to the cable television services historically provided by cable operators is correct. The increasing convergence of cable and wireline providers makes the historic classifications of service providers increasingly irrelevant. Indeed, the Commission recognized In the *Cable Declaratory Ruling* that cable operators are increasingly providing local exchange services.[35] The Commission concluded that it was more appropriate to establish a consistent national access regime for all cable systems, rather than imposing different rules on cable operators that also have a common carrier local telephony offering.[36] A consistent access regime for cable and wireline broadband Internet access services is equally appropriate.

---

[35] *See Cable Declaratory Ruling,* at ¶ 44-46.

[36] *Id.* at ¶ 46.

The cable operator position is, once again, inconsistent. Cable operators strenuously argue that states and localities cannot be allowed to extend cable television regulations and franchise fees to cable broadband Internet access services.[37] Yet they also take the contradictory position that regulation of wireline broadband Internet access services may be justified because of the legacy regulations that apply to narrowband local telephone services.[38] This position is not remotely credible.

First, cable operators are intentionally blurring the issue of a mandatory ISP access requirement with the distinct obligation that ILECs have under section 251(c) to provide CLECs with physical unbundled access to their legacy circuit-switched networks. AT&T, for example, claims that regulation of wireline broadband services is necessary to promote competition in the local telephone market.[39] NCTA even assumes, for purposes of its economic analysis, that a mandatory ISP access requirement for cable broadband Internet access services would resemble the physical unbundling requirements of section 251(c).[40]

These attempts to confuse ISP access with CLEC access are absurd. The Commission has *never* required that ILECs physically unbundle their circuit-switched networks for ISPs, and there is no basis whatsoever for assuming that it would impose such a requirement on cable broadband networks. Further, the *Computer Inquiry* rules predate the Telecommunications Act of 1996 by more than a dozen years and have nothing to do with competition in the local voice market. As cable operators themselves emphasize in their comments, a mandatory ISP access

[37] NCTA Comments at 46-47.

[38] *Id.* at 41.

[39] AT&T Comments at 26-27.

[40] *Owen Economic Paper* at 4.

requirement does nothing to expand facilities-based competition because it merely provides competitive access to existing facilities.[41] The same is true of requirements that are designed to provide ISPs with access to wireline broadband facilities.

Cable operators also ignore the fact that the *Computer Inquiry* requirement to provide the transmission component of Internet access services as a stand-alone telecommunications service applies to *all* wireline providers (including CLECs and IXCs), not just ILECs.[42] Therefore, it is plainly incorrect to characterize this requirement as being a function of so-called ILEC monopoly power, as some cable operators claim.[43] It is, instead, a classic example of regulation taking on a life of its own and remaining in place long after it provides any benefits to consumers. There is no conceivable justification for the Commission to impose such a requirement on non-dominant wireline companies now that it has decided not to require dominant cable operators to perform such "radical surgery" on their broadband Internet access services.

Second, the ILECs' investment in *new* facilities to provide *new* broadband services has nothing to do with their prior exclusive franchises in the narrowband local voice market. There can be no serious argument that the protected monopoly theory applies to this new investment.[44] That theory is dubious even for legacy facilities, for SBC and other ILECs have been under price caps for many years. But whatever the merits of that theory with respect to the legacy network,

---

[41] NCTA Comments at 14.

[42] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket Nos. 02-33, 95-20 and 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 42 (2002).

[43] Cox Comments at 9; NCTA Comments at 41; AT&T Comments at 25.

[44] *See* SBC Comments at 13-20, CC Docket No. 02-33 (FCC filed May 3, 2002).

there can be no argument that it applies to new investment in packet-based broadband networks. SBC no longer enjoys an exclusive franchise or any other state protection. Indeed, the Act *prohibits* it.[45] To say simply that the ILECs, at one time in the past, enjoyed protection under exclusive franchises says nothing about the rules under which they operate today. It certainly says nothing about the ILECs' risky investments in the broadband market, where they have a minority share of the market and are attempting to compete with dominant cable providers. It is SBC's shareholders, not monopoly-era ratepayers, that have borne and continue to bear the significant economic risks associated with broadband investment.

Third, the Commission's regulation of broadband Internet access services has nothing to do with its regulation of traditional services provided by cable operators and wireline companies. Notwithstanding the Commission's decision in the *Cable Declaratory Ruling*, cable operators continue to discuss the burdens and regulatory obligations of cable television services as if they have some relevance to the regulation of broadband Internet access services. While cable operators may be required to pay franchise fees for their cable television revenues,[46] the Commission clearly held that such fees do *not* apply to revenues from cable broadband Internet access services.

In any event, franchise fee payments do not provide a relevant basis for distinguishing between cable operators and wireline companies. Wireline companies must pay significant fees to local authorities as compensation for use of public rights of way. Further, ILECs indisputably are subject to a long list of regulatory burdens in their provision of traditional narrowband local voice services that far exceed any regulation that applies to cable television services. But all of

[45] *See* 47 U.S.C. § 253(a) ("No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

these regulatory burdens are beside the point. Again, the only relevant issue in this proceeding and the Commission's other broadband-related proceedings is the appropriate regulatory framework for broadband Internet access services, regardless of technology or the historical classification of the service provider.

III. THE COMMISSION SHOULD ESTABLISH A UNIFORM REGULATORY FRAMEWORK FOR BROADBAND INFORMATION SERVICES UNDER TITLE I.

The Commission should establish a national uniform regulatory framework for all competing broadband services under Title I. As SBC has explained, a key benefit of Title I is that it provides a framework for the Commission to create a minimal regulatory environment for broadband services free of the distortions created by legacy regulations. At the same time, the Commission can monitor the development of the broadband market and, if necessary, adopt uniform regulatory requirements for cable and wireline broadband providers. The Commission has broad discretion under Title I to determine the level of regulation that is appropriate and necessary for all broadband information services, and it should use that discretion to create a rational regulatory paradigm for all broadband services.

A. The Commission's Ancillary Jurisdiction.

Several cable operators argue that the Commission lacks ancillary jurisdiction under Title I to impose a mandatory ISP access requirement on cable broadband Internet access services.[47] They argue that the Commission's ancillary jurisdiction cannot support the imposition of an access requirement on cable modem service as an interstate information service [48] and as a non-

---

[46] AT&T Comments at 27-28; NCTA Comments at 34; Comcast Comments at n.85.

[47] Cox Comments at 7-14; NCTA Comments at 7-10.

[48] NCTA Comments at 9-10.

common carrier service.[49] In effect, cable operators appear to be arguing that cable modem services are beyond the regulatory reach of the Commission. This argument is plainly incorrect.

The Commission's ancillary jurisdiction to establish a mandatory ISP access requirement does not depend on the common carrier status of cable modem services. Congress has given the Commission broad subject matter jurisdiction over interstate communication "by wire or radio" that clearly extends beyond common carrier telecommunications services.[50] There can be no question that cable modem service involves interstate communications within the meaning of sections 152 and 153. The only issue, therefore, is whether a mandatory ISP access requirement protects or promotes a statutory purpose.[51] As the Commission recognized in the *Cable Broadband NPRM*, a number of statutory provisions — including section 230, Title VI and section 706 of the 1996 Act — could provide the basis for its exercise of ancillary jurisdiction over cable modem services.[52] None of these statutory provisions is limited to common carrier telecommunications services.

Moreover, cable operators ignore the fact that the Commission retains the legal authority to regulate the telecommunications component of cable broadband Internet access services as a telecommunications service under Title II. In the *Cable Declaratory Ruling*, the Commission recognized that cable modem service is provided "via telecommunications" and expressly considered whether to require cable operators to peel off a stand-alone common carrier

---

[49] Cox Comments at 11.

[50] 47 U.S.C. §§ 152-53.

[51] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[52] *Cable Broadband NPRM,* at ¶ 79.

telecommunications service from their integrated broadband Internet access service offerings.[53] The Commission clearly could have regulated the telecommunications component of cable modem services as a Title II service if it had so chosen, just as it regulates the telecommunications component of wireline broadband Internet access services. The fact that it chose not to do so for *policy reasons* does not deprive it of jurisdiction it would otherwise have over cable modem services. The Commission cannot diminish or enhance its own statutory jurisdiction; it can merely determine whether and how to *exercise* that jurisdiction.

Aside from the fact that the common carrier status of cable operators is irrelevant, the assertion of cable companies that they are not common carriers is increasingly dubious. In fact, as the Commission has recognized, more and more cable operators are operating as common carriers[54] — they are providing local telephone service to more than 2 million customers and virtual private network services to business customers.[55] Moreover, the convergence of cable and wireline providers will rapidly accelerate as cable operators deploy voice over the Internet protocol (VoIP) platforms that compete directly with traditional common carrier telephone services.

While the Commission's ancillary jurisdiction over cable modem services is thus indisputable, it is also clear that the scope of the Commission's ancillary jurisdiction is fairly broad. In *Computer II*, the Commission found that the exercise of ancillary jurisdiction over both enhanced services and CPE was necessary to assure the nationwide availability of wire

[53] *Id.* at ¶¶ 39-43.

[54] *Id.* at ¶ 46.

[55] *See id.* at n.129.

communications services at reasonable prices under section 152(a) of the Act.[56] The D.C. Circuit upheld the *Computer II* order as a reasonable exercise of the Commission's ancillary jurisdiction.[57] It also noted that in designing the Communications Act, Congress sought "to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications," thereby avoiding the need for repetitive legislation.[58] Just as the Commission accommodated the convergence of communications and data processing in the *Computer Inquiry* proceedings,[59] it should accommodate the convergence of various broadband technology platforms (including cable and wireline networks) by establishing a uniform regulatory framework for all broadband services.

That is not to say the Commission's discretion is unlimited. As with any regulations, they must be rationally related to a legitimate statutory purpose. In this regard, the Commission cannot consider a mandatory ISP access requirement for cable modem services in a vacuum. The ultimate issue in this proceeding is whether consumers will have reasonable access to content and information services over broadband facilities in the absence of regulation. Clearly, the Commission cannot reach a rational conclusion with respect to that ultimate issue unless it considers both the regulatory obligations of competing wireline broadband Internet access services and cable operators' status as the market leader.[60]

---

[56] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 F.C.C.2d 384, 430-34, 450-57 (1980).

[57] *CCIA v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982).

[58] *Id.* at 213-214 (quoting *Gen. Tel. Co. of the Southwest v. United States*, 449 F.2d 846, 853 (5th Cir. 1971).

[59] *Id.* at 214.

[60] *See Cable Broadband NPRM*, at ¶ 78.

In addition, any regulations imposed by the Commission under Title I must be consistent with other provisions of law, including the Act and the U.S. Constitution. SBC agrees with cable operators that a mandatory ISP access requirement raises significant statutory and constitutional concerns,[61] depending upon the particular requirement adopted by the Commission. In particular, as SBC previously discussed, certain types of mandatory access requirements could run afoul of section 706, which requires that the Commission consider the negative effects of its regulations on the deployment of broadband services to all Americans. The Commission also must consider Congress' directive in section 230(b)(2) that the Internet should remain unfettered by federal and state regulation. In addition, SBC agrees with cable operators that a mandatory ISP access requirement implicates both the First Amendment and Fifth Amendment.[62] In light of these statutory and constitutional constraints, the Commission must attempt to identify the minimum amount of regulation, if any, that is needed to achieve the purposes of the Act. Importantly, however, none of these legal issues are uniquely implicated under Title I. Rather, the Commission must grapple with them irrespective of the applicable regulatory framework for broadband services.

B. Title I Regulatory Framework.

SBC urges the Commission to establish a minimal regulatory environment for all broadband information services free of the impediments and distorting effects of legacy regulation. We share the concerns of cable operators that any mandatory ISP access requirement would take on a life of its own and remain in place long after it provides any benefits for

[61] *See, e.g.*, NCTA Comments at 6-7.

[62] Comcast Comments at 17-21.

consumers.[63] That is precisely what has happened with the *Computer Inquiry* requirements. The Commission implemented the *Computer Inquiry* requirements more than 20 years ago in a "one wire world" that bears no resemblance to today's intensely competitive broadband market. Unfortunately, these outdated requirements have been carried forward to the broadband market automatically, without an affirmative determination by the Commission about whether they are necessary or appropriate for wireline broadband Internet access services.

SBC, however, does not agree with cable operators that all forms of mandatory ISP access requirements would be equally burdensome and harmful. In discussing the costs and negative effects of regulation, cable operators fail to distinguish between the possible types of ISP access requirements. NCTA, for example, assumes that the Commission would impose physical unbundling requirements on cable operators similar to those codified in section 251 of the Act.[64] Other cable commenters assume that any type of mandatory ISP access requirement would inevitably lead to price controls and more burdensome regulatory obligations.[65] As SBC discussed in its initial comments, the Commission could establish a basic ISP access requirement that gives broadband providers the flexibility to enter into market-based arrangements with ISPs. An important cost consideration for the Commission would be whether broadband providers are required to provide mandatory access to some or all ISPs.

Regarding the status of other broadband services, Charter Communications states that, at least at "this very early stage in the VoIP market," the Commission should maintain a "flexible

---

[63] NCTA Comments at 26. Cox raises a related concern that any type of Commission regulation engenders regulatory disputes, rather than business-to-business compromises. Cox Comments at 29-30. SBC has firsthand experience with parties seeking to gain a business advantage through the regulatory process and it shares Cox's concern.

[64] *Owen Economic Paper* at 4.

[65] Cox Comments at 28-29.

policy stance" and "consider classifying [VoIP] services as information services."[66] VoIP services are being deployed over the same networks and using the same or similar packet technologies as broadband Internet access itself. There is accordingly no reason to believe VoIP services will be any less competitive than broadband Internet access, and thus no reason to believe the Commission's intervention will be warranted. The critical point, however, is that the Commission must maintain a principled approach that applies equally across competing platforms. If the Commission is to exercise restraint in this regard as to the cable incumbents, it must do so as well as to wireline companies so that all competitors have the same flexibility to respond to the demands of the competitive market by creating and packaging broadband information service offerings that include VoIP capabilities.

Indeed, this common-sense principle should govern the Commission's regulation of *all* information services based on packet technology. New technologies are being developed that integrate transmission with content and/or information service functionality. These services fuse transmission and computer processing functionalities in ways that make it difficult, if not impossible, to separate out a pure transmission service. Existing regulatory rules effectively preclude the full use of such new technologies, and therefore are stifling investment in them. In this and related proceedings, the Commission must seek to eliminate these anti-competitive impacts, and put in place a framework that encourages *all* providers to develop and deploy new technologies that deliver cost-effective integrated broadband information services to consumers.

Moreover, regulation should not distort how services in the nascent broadband market are offered to best meet customer needs. Some customers may desire a broadband telecommunications service, while others may prefer a broadband information service. The

---

[66] Charter Communications Comments at 40-41.

Commission should give all broadband providers the flexibility to respond to market demands. It already has given other operators — including DBS licensees,[67] MDS operators,[68] and satellite carriers[69] — freedom to position their services under one of the several different regulatory models defined in the Communications Act, and ILECs already have that freedom for video services.[70] In those instances, rapid technological advances, the absence of a bottleneck, and the advent of new services supported a market-driven, deregulatory approach, one that would "encourag[e] additional entry, additional facility investment, [and] more efficient use" of resources, while "allow[ing] for technical and marketing innovation in the provision of . . . services."[71] The market upshot has been a healthy mix of common carrier and non-common carrier services.

Consistent with the statutory mandate of section 706, the Commission's regulation of broadband services should be minimal and narrowly tailored to address any specific issues that

---

[67] *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Report and Order, 90 F.C.C.2d 676, ¶¶ 78-84 (1982).

[68] *Revisions of Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service*, Report and Order, 2 FCC Rcd 4251, ¶¶ 1-16 (1987).

[69] *Domestic Fixed-Satellite Transponder Sales*, Memorandum Opinion, Order and Authorization, 90 F.C.C.2d 1238, 1261, ¶ 56 (1982).

[70] *See* 47 U.S.C. § 571(a)(2) ("To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of [Title II]"); *id.* § 571(a)(3) ("To the extent that a common carrier is providing video programming . . . in any manner other than that described in paragraphs (1) and (2), . . . such carrier shall be subject to the requirements of [Title VI], unless such programming is provided by means of an open video system . . . under section 573 . . . .").

[71] *Domestic Fixed-Satellite Transponder Sales*, 90 F.C.C.2d at 1255, ¶ 41; *see also Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1468 (D.C. Cir. 1984) ("[r]apid technological advances, demand shifts, and changes in entrepreneurial judgments" caution against "an inflexible regulatory regime").

the Commission determines compels government intervention. This applies equally to regulation of broadband information services and broadband telecommunications services. At a minimum, therefore, the Commission should classify all providers as non dominant in the provision of broadband telecommunications services.

IV. Conclusion

There are compelling reasons for the Commission to apply the same mandatory ISP access requirements, if any, to cable and wireline broadband Internet access services. First, cable and wireline broadband networks are functionally equivalent for purposes of providing ISP access. Therefore, the Commission cannot reasonably conclude that regulation is excessively burdensome on cables' provision of broadband Internet access services without reaching the same conclusion for wireline broadband providers. Second, cable and wireline broadband Internet access services are direct competitors in the market. Maintaining an asymmetric ISP access requirement would distort competition and deter investment in the broadband market. The solution is for the Commission to harmonize its regulation of broadband services by establishing a uniform regulatory framework under Title I.

Respectfully Submitted,

/s/ Jeffry A. Brueggeman
Jeffry A. Brueggeman
Gary L. Phillips
Paul K. Mancini

SBC COMMUNICATIONS INC.
1401 Eye Street, NW, Suite 400
Washington, D.C. 20005
(202) 326-8911 – Phone
(202) 408-8745 – Facsimile

August 6, 2002

Its Attorneys